

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE

DIVISION II

CA06-1450

JUNE 13, 2007

JOE HEFLIN

APPELLANT

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F403777]

V.

FIRESTONE TUBE COMPANY and
GALLAGHER BASSETT SERVICES,
Carrier

APPELLEES

AFFIRMED

This appeal follows the September 15, 2006, decision of the Arkansas Workers' Compensation Commission (Commission) affirming and adopting the October 18, 2005, opinion of the Administrative Law Judge (ALJ) finding that appellant Joe Heflin failed to prove by a preponderance of the evidence that he sustained a compensable neck injury as a compensable consequence of the compensable left-shoulder injury he sustained on March 8, 2004, and consequently finding that he was not entitled to additional temporary-total-disability benefits from September 1, 2004, to December 6, 2004, or additional medical benefits. On appeal, appellant challenges the sufficiency of the evidence supporting both of those findings. We affirm.

Appellant, age forty-four, began working for appellee Firestone Tube Company in 1983. He sustained an admittedly compensable injury to his left shoulder on March 8, 2004, when a forty-pound tube he was pulling from an overhead skid with both hands fell, jerking down on his left arm and causing him to experience an immediate burning sensation in the front and back of his left shoulder.

On March 15, 2005, appellant underwent an MRI on the left shoulder, which revealed “lateral impingement with tendonitis and/or partial tears of the rotator cuff tendons.” Appellant was referred to Dr. Jimmy Tucker, who opined that he “possibly has a SLAP tear in addition to the partial thickness rotator cuff tear.” On April 12, 2004, appellant underwent surgery, performed by Dr. Tucker, which improved the range of motion and movement of his arm and relieved the stabbing pain in his shoulder. However, he continued to suffer from burning in his fingers and in the palm of his left hand. Appellant began physical therapy, but began experiencing a burning sensation down his arm during a session. In his June 23, 2004, report, Dr. Tucker stated that appellant may have HNP in his cervical spine, but the MRI showed otherwise; specifically, that he had multiple levels of degenerative-disc disease.

Appellant returned to work on August 23, 2004, but had worked only seven days before his neck pain became intolerable. Dr. Tucker took appellant off work on September 1, 2004, and ordered another MRI and additional testing. At the request of appellees, an independent medical examination was subsequently performed on appellant by Dr. Scott Schlesinger on September 20, 2004. He reviewed appellant’s MRI results and determined that appellant’s neck pain was due to aggravation of underlying cervical-degenerative-disc

disease, and that he had degenerative changes with no herniations, nerve-root compression, spinal stenosis or foraminal stenosis, or any abnormal signal in the cord. Dr. Schlesinger also stated that the numbness in appellant's hand was probably related to a stretching of the brachial plexus at the time of the left-shoulder injury. Appellant returned to work on September 22, 2004, with light-duty restrictions.

Appellant was referred to Dr. Steven Cathy, and he examined appellant on November 23, 2004. He performed a repeat MRI of appellant's cervical spine, which was unremarkable and showed no evidence of HNP, stenosis, or nerve-root impingement. Dr. Cathy agreed with Dr. Schlesinger's opinion and concluded that appellant's "neck and upper back pain [is] secondary to a musculoskeletal injury that should eventually go on and resolve." Appellant was issued a full release back to work on December 6, 2004.

Appellant was provided temporary-total-disability benefits from April 12, 2004, to August 23, 2004, and permanent-partial-disability benefits for a seven-percent permanent impairment to the body as a whole for the left shoulder injury. Appellees controverted appellant's additional medical treatment related to the neck symptoms, as well as additional temporary-disability benefits. At the July 22, 2005, hearing before the ALJ, the ALJ found that appellant failed to prove by a preponderance of the evidence that he sustained a compensable neck injury as a compensable consequence of the compensable left-shoulder injury he sustained on March 8, 2004, and consequently finding that he was not entitled to additional temporary-total-disability benefits from September 1, 2004, to December 6, 2004,

or additional medical benefits. The Commission affirmed and adopted the ALJ's opinion, and this appeal followed.

Typically, on appeal to this court, we review only the decision of the Commission, not that of the ALJ. *Daniels v. Affiliated Foods S.W.*, 70 Ark. App. 319, 17 S.W.3d 817 (2000). In this case, the Commission affirmed and adopted the ALJ's opinion as its own, which it is permitted to do under Arkansas law. *See Death & Permanent Total Disability Trust Fund v. Branum*, 82 Ark. App. 338, 107 S.W.3d 876 (2003). Moreover, in so doing, the Commission makes the ALJ's findings and conclusions the findings and conclusions of the Commission. *Id.* Therefore, for purposes of our review, we consider both the ALJ's order and the Commission's majority order.

In appeals involving claims for workers' compensation, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision and affirms the decision if it is supported by substantial evidence. *See Kimbell v. Ass'n of Rehab Indus. & Bus. Companion Prop. & Cas.*, 366 Ark. 297, ___ S.W.3d ___ (2006). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether the appellate court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, the appellate court must affirm the decision. *Id.* Where the Commission denies a claim because of the claimant's failure to meet his burden of proof, the substantial-evidence standard of review requires that we affirm if the Commission's decision displays a substantial basis for the denial of relief. *Id.* We will not reverse the Commission's

decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Dorris v. Townsends of Ark., Inc.*, 93 Ark. App. 208, 218 S.W.3d 351(2005).

Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *Patterson v. Ark. Dep't of Health*, 343 Ark. 255, 33 S.W.3d 151 (2000). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. *Id.* The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.* The Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002). Thus, we are foreclosed from determining the credibility and weight to be accorded to each witness's testimony. *Arbaugh v. AG Processing, Inc.*, 360 Ark. 491, 202 S.W.3d. 519 (2005). As our law currently stands, the Commission hears workers' compensation claims de novo on the basis before the ALJ pursuant to Ark. Code Ann. § 11-9-704(c)(2), and this court has stated that we defer to the Commission's authority to disregard the testimony of any witness, even a claimant, as not credible. See *Bray v. Int'l Wire Group*, 95 Ark. App. 206, ___ S.W.3d ___ (2006).

I. Continuing Neck Symptoms

Appellant argues he has proven a causal connection between his compensable shoulder injury and the continuing symptoms, and that his physicians agreed that his compensable shoulder injury was the cause of the continued symptoms in his neck. Because his condition required additional treatment and time off work, he contends that he is entitled to benefits in connection with the neck symptoms.

He first points to Dr. Tucker's opinion dated September 8, 2004, that there was a causal connection between the two, in relevant part:

[Appellant] sustained a shoulder and neck injury at work on 3/8/04 and underwent surgery on the shoulder 4/12/04. At that time the severity of the shoulder pain masked his neck pain. His shoulder injury is now resolving and the neck pain has become more prominent. It is my medical opinion that the neck pain is a result of the injury he sustained on 3/8/04.

Additionally, even Dr. Schlesinger, who saw appellant at appellees' request, issued a report on appellant's continued symptoms that support appellant's contention. After reviewing his MRI results, Dr. Schlesinger stated, "There is no disc herniation, nerve-root compression, spinal stenosis or foraminal stenosis. There is no abnormal signal in the cord." He also stated that appellant's neck pain could be caused by a number of things, including an aggravation of underlying degenerative arthritis in his neck, although this is confusing given his earlier statement previously set forth. As part of the same September 20, 2004, opinion, Dr. Schlesinger stated that, "I believe the numbness and tingling in the ulnar three digits of the left hand are probably related to stretching of the brachial plexus at the time of this shoulder injury." Dr. Tucker explained in his deposition that the brachial plexus is a nerve running from the neck, through the shoulder and into the arm, and stated that it can be damaged by

something pulling down on the arm. He further explained that such an injury would cause pain in the neck and numbness in the hand.

Appellees maintain that the Commission correctly found that appellant failed to meet his burden of proof regarding a causal connection between his neck complaints and his compensable shoulder injury. As the claimant, appellant had the burden of proving a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E). A “compensable injury” is one “arising out of and in the course of employment.” Ark. Code Ann. § 11-9-102(4)(A). In order to prove a compensable injury the claimant must prove, among other things, a causal relationship between his employment and the injury. *Stutzman v. Baxter Healthcare Corp.*, __ Ark. App. __, __ S.W.3d __ (May 9, 2007). It is the Commission’s function to determine the weight to be afforded to the testimony and medical evidence. *Id.* Appellees contend that the evidence does not support a conclusion that there is a causal connection between appellant’s neck complaints and his left shoulder injury.

They point to Dr. Tucker’s testimony that some of the neck pain could come from the shoulder and that it was predominantly neurological, very different than the shoulder. Additionally, appellees note that Dr. Tucker testified that June 23, 2004, was the first time appellant complained to him of neck or cervical-spine pain. Appellant himself testified that he did not have neck pain until the later part of June 2004, some three months after the compensable shoulder injury occurred. Also, they claim that none of the physicians opined that there was a causal connection between the compensable left-shoulder injury and the complaints of neck pain. Dr. Tucker admitted that he does not specialize in cervical-spine

treatment, and stated that he would defer to Drs. Schlesinger and Cathey regarding their findings and opinions regarding appellant's complaints of neck pain. Finally, they underscore that Dr. Tucker testified that his opinion regarding appellant's complaints of neck pain were based solely on the history appellant provided to him, rather than on any objective findings or physical examinations that he performed. It was the Commission's prerogative to assign the weight it deemed necessary to each of the physician's testimony, and it appears that they relied more heavily of that of Drs. Schlesinger and Cathey.

The results from the diagnostic testing performed regarding appellant's complaints of neck pain were normal for his cervical spine, with the exception of pre-existing degenerative-disc disease. He did not complain of the neck pain until some three months after the compensable accident. Fair-minded persons with the same facts before them could have reached the conclusions arrived at by the Commission with respect to this issue; accordingly, we affirm on this point.

II. Additional Temporary Benefits

Appellant contends that he is entitled to additional temporary-total and partial-disability benefits related to the previously discussed neck symptoms. Specifically, appellant asserts that he is entitled to temporary-total-disability benefits from September 1, 2004, through September 22, 2004, during the time that Dr. Tucker took him off work. At that time, appellant was experiencing neck pain, loss of his range of motion, and increased numbness in his fingers. Appellant testified as to his inability to work at that time. He contends that he was still within his healing period, unable to work, and had not stabilized,

as set out in Ark. Code Ann. § 11-9-102(8). Accordingly, he asks for additional temporary-total-disability benefits for that time period.

Secondly, he claims he is also entitled to temporary-partial-disability benefits from September 22, 2004, through December 6, 2004. Dr. Tucker returned him to work on September 23, 2004, with light-duty restrictions; however, appellant points out that light-duty work was not provided. He did not actually return to work until December 6, 2004. He claims that during that time he remained in his healing period, his condition had not stabilized, and he continued to receive medical treatment. Additionally, Dr. Tucker stated that the restrictions placed on appellant from September 1, 2004, through November 5, 2004, were due to the March 8, 2004, injury to his left shoulder and neck. Appellant argues that there was sufficient evidence before the Commission that: (1) he remained in his healing period and was entitled to temporary-disability benefits from September 1, 2004, through December 7, 2004; and (2) his restrictions during that time were caused by and certainly in connection with his March 8, 2004, compensable injury.

Appellees assert that the Commission was correct in denying appellant's request for temporary-disability benefits. They point out that appellant had been assessed as being at maximum-medical improvement and issued an impairment rating that was accepted by appellees, and there is nothing in the record to support a finding that he was within his healing period for the work-related left-shoulder injury. They contend that any incapacity to earn wages during that time was not due to the March 8, 2004, compensable injury.

For a claimant to be entitled to temporary-total-disability benefits, he must prove by a preponderance of the credible evidence that he remained within his healing period *and* was totally incapacitated to earn wages. See *Ark. State Hwy. Dep't. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981); *King v. Peopleworks*, 97 Ark. App. 105, ___ S.W.3d ___ (2006). Persistence of pain is not sufficient in itself to extend the healing period or to find claimant totally incapacitated from earning wages. See *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

There are diagnostic findings in the record regarding appellant's degenerative-disc disease that support the decisions reached by the ALJ and the Commission. Because we will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the same conclusions, we affirm on this point as well.

Affirmed.

MARSHALL and MILLER, JJ., agree.